INTERIOR BOARD OF INDIAN APPEALS

Clayton J. Wray v. Deputy Assistant Secretary - Indian Affairs (Operations)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

CLAYTON J. WRAY

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 83-14-A Decided January 27, 1984

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) affirming a denial of a request for refund of prepaid rents under leases of Indian trust lands.

Affirmed.

1. Administrative Procedure: Administrative Review--Appeals--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

   The Board of Indian Appeals has jurisdiction under 25 CFR 2.19(c)(2) to review decisions of the Deputy Assistant Secretary--Indian Affairs (Operations) rendered under the administrative appeal regulations of 25 CFR Part 2 that are not based solely on the exercise of discretion. A decision that requires the application of general legal principles to a specific fact situation involves an interpretation of law and is not solely discretionary. Therefore, it can be reviewed by the Board.

2. Administrative Procedure: Administrative Review--Appeals--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

   The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

3. Administrative Procedure: Administrative Review--Appeals--Board of Indian Appeals: Jurisdiction--Rules of Practice: Appeals: Generally

A decision by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 that is not timely appealed to the Board of Indian Appeals is final for the Department.

4. Administrative Authority: Generally--Bureau of Indian Affairs: Administrative Appeals: Leases--Indian Lands: Leases and Permits: Revocation or Cancellation

A decision of the Bureau of Indian Affairs that cancels a lease of Indian trust lands generally involves an interpretation of the lease provisions, relevant Federal regulations governing cancellation procedures, and applicable Federal, state, and tribal case and statutory law. Such a decision cannot properly be characterized under 25 CFR 2.19 as solely discretionary.

5. Administrative Procedure: Administrative Review--Administrative Procedure: Decisions--Appeals--Bureau of Indian Affairs: Administrative Appeals: Generally

25 CFR 2.19 contemplates that, within 30 days after an appeal taken to the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 becomes ripe for decision, the appeal will either be decided by a written decision or referred to the Board of Indian Appeals for decision.

6. Administrative Procedure: Administrative Review--Appeals--Board of Indian Appeals: Jurisdiction-Bureau of Indian Affairs: Administrative Appeals: Generally

Upon the expiration of the 30-day time period for decision established by 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal, motion to assume jurisdiction, or other document alleging Board jurisdiction. The original filing under 25 CFR 2.11(a) is insufficient to invoke the Board's jurisdiction automatically after the expiration of the time period.

7. Indian Lands: Leases and Permits: Generally

The Board of Indian Appeals will apply the law of the state in which real property held in trust for an

Indian lessor is located in determining whether prepaid rent may be retained by the lessor when a lease was canceled because of the lessee's violations.

APPEARANCES: Clayton J. Wray, pro se. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On January 24, 1983, the Board of Indian Appeals (Board) received a notice of appeal from Clayton J. Wray (appellant), seeking review of a December 22, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary, appellee). That decision affirmed the denial of appellant's request for a refund of advance rent paid pursuant to leases 6836, 6837, and 6697 on the Tulalip Indian Reservation in the State of Washington. For the following reasons, the Board affirms the decision.

Background

On January 27, 1981, appellant's leases of lands on the Tulalip Indian Reservation were canceled by the Superintendent of the Puget Sound Agency (Superintendent), Bureau of Indian Affairs (BIA). These cancellations were upheld by the Deputy Assistant Secretary on July 15, 1981. No appeal was taken from this decision.

In a September 1, 1982, letter to the Superintendent, appellant demanded either that advance rents paid to the lessor under the terms of the canceled leases be refunded, or that the amount of the requested refund be applied against the balance remaining on a promissory note given to the lessor by

appellant for damages to the leasehold committed during the term of the lease. The amount appellant sought in either case was the difference between what he then owed on the note and the greater amount the lessor allegedly owed him as a refund of prepaid rent. 1/ Appellant also indicated his intention to stop further payments on the note.

On September 2, 1982, the Superintendent informed appellant that he was not entitled to a refund of prepaid rent because the leases had been canceled as a result of his violations of their terms. Furthermore, the Superintendent concluded that the balance on the installment note was still owed.

Appellant appealed the Superintendent's denial on September 4, 1982. On September 29, 1982, the Acting Area Director, Portland Area Office, BIA, denied appellant's appeal. Citing legal precedents, the Acting Area Director held that rent paid in advance became the property of the lessor and, absent special provisions in the lease, could not be recovered by the lessee unless the lessor wrongfully terminated the lease. Because he found the leases here had been canceled through appellant's fault, the Acting Area Director determined that a refund was not appropriate and that appellant continued to owe the balance of the promissory note.

On October 29, 1982, appellant appealed the Acting Area Director's decision to the Deputy Assistant Secretary, who affirmed it on December 22, 1982. Appellant's subsequent notice of appeal to the Board, received on

1/ Appellant issued a promissory note in the amount of $3,749.59 to the lessor on Oct. 12, 1981, for timber trespass resulting from his having cut trees on the leasehold without permission. According to appellant's calculations, the lessor owed him a refund of $822.05 for prepaid rent, and he owed the lessor $612.71 on the promissory note. Appellant seeks the difference of $209.34. See appellant's letter to the Board dated Feb. 2, 1983.

January 24, 1983, requested the Board to take jurisdiction over his appeal to the Deputy Assistant Secretary under 25 CFR 2.19(b). Appellant alleged that the Deputy Assistant Secretary had failed to decide the appeal within 30 days from the date all pleadings were filed. On January 25, 1983, the Board docketed the appeal and requested information on the status of the matter from the Deputy Assistant Secretary.

The Deputy Assistant Secretary responded on March 15, 1983. He asserted that appellant had exhausted all administrative remedies because the December 22, 1982, decision denying the appeal was based on the exercise of discretionary authority and was therefore final for the Department.

After reviewing the information provided by appellant and the Deputy Assistant Secretary, the Board found it did not have jurisdiction over the appeal under 25 CFR 2.19(b), but did under 25 CFR 2.19(c)(2). It therefore issued a preliminary jurisdictional determination on March 25, 1983, finding that the December 22, 1982, decision appealed from was based on an interpretation of law and was not solely discretionary. Consequently, the decision could be reviewed.

On April 22, 1983, after receipt of the administrative record, the Board established a briefing schedule. Appellant filed an opening brief on May 14, 1983. No briefs in opposition were submitted

Jurisdiction

The parties were given an opportunity during the briefing period to dispute the March 25, 1983, preliminary determination that appellee's

decision was based on an interpretation of law. No briefs alleging error were filed.

[1] The Board took jurisdiction over this appeal under 25 CFR 2.19(c)(2). Section 2.19 states in pertinent part:

> (a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [2/] shall:
>
> (1) Render a written decision on the appeal, or
>
> (2) Refer the appeal to the Board of Indian Appeals for decision.
>
> (b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision.
>
> (c) When the Commissioner renders a written decision on an appeal, he shall include one of the following statements in the written decision:
>
> (1) If the decision is based on the exercise of discretionary authority, it shall so state; and a statement shall be included that the decision is final for the Department.
>
> (2) If the decision is based on interpretation of law, a statement shall be included that the decision will become final 60 days from receipt thereof unless an appeal is filed with the Board of Indian Appeals * * *.

Under section 2.19(c)(2), the Board has jurisdiction to review decisions based on interpretations of law. The decision in this case involved a determination of whether appellant was entitled to a refund of prepaid rent under the circumstances presented. The decision required the application of

2/ The administrative review functions of the Commissioner of Indian Affairs were assigned to the Deputy Assistant Secretary-- Indian Affairs (Operations) by memorandum dated May 15, 1981, and signed by the Assistant Secretary for Indian Affairs.

general legal principles to a particular fact situation. Such a process is the essence of legal decisionmaking. In contrast, discretion, as referred to in section 2.19(c)(1), involves the exercise of individual judgment, unhampered by legal rules. See Black's Law Dictionary 553 (Rev. 4th Ed. 1968).

[2] The Board has held that BIA's characterization of a decision as discretionary constitutes a legal conclusion, subject to Board review. Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 90 I.D. 243 (1983); Billings American Indian Council v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 142, 144 (1983). A decision properly characterized as discretionary will, absent extraordinary circumstances, 3/ not be reviewed. See 43 CFR 4.330(b)(2); Billings American Indian Council, supra; Face v. Acting Assistant Secretary--Indian Affairs, 11 IBIA 35 (1983). A decision improperly characterized as discretionary, however, will be reviewed to the extent of the legal conclusions reached. Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 89 I.D. 655 (1982). In this case, the Board affirms its preliminary determination that the entire decision is based on an interpretation of law and is reviewable.

Discussion and Conclusions

The specific question before the Board is whether a lessee of Indian trust lands is entitled to a refund for prepaid rentals when the lease was

3/ An example of extraordinary circumstances would be a referral of a matter to the Board by the Secretary of the Interior without limitation on the Board's scope of review. See 43 CFR 4.330(a)(2); Pueblo of Laguna v. Assistant Secretary for Indian Affairs, 12 IBIA 80, 90 I.D. 521 (1983).

canceled due to the lessee's violations of its terms. Appellant, however, raises several additional issues that should be considered before this question is reached.

[3] Appellant first argues that the July 15, 1981, decision cancelling his leases was incorrect. Appellant did not appeal this decision to the Board when it was issued. Consequently, the decision is final for the Department. Estate of Ralph James (Elmer) Hail, 12 IBIA 62, 65 (1983); Walch Logging Co. v. Portland Assistant Area Director, 11 IBIA 85, 90 I.D. 88, 92 (1983). The Board will not permit a collateral attack on that decision in the context of this appeal. Seattle Indian Center v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 67, 78 n.9, 90 I.D. 515, 521 n.9 (1983); Hamlin v. Portland Area Director, 9 IBIA 16 (1981). Furthermore, to the extent that the present appeal might be construed as also constituting an appeal of the 1981 cancellation decision, the Board does not have jurisdiction to consider an untimely appeal (Hail, supra, and cases cited therein) and will not consider on appeal issues not raised below (Burns v. Anadarko Area Director, 11 IBIA 133 (1983)).

Appellant's argument concerning the 1981 decision, however, raises two related issues that the Board believes should be addressed. In attempting to overturn that decision, appellant first attacks the characterization of it as discretionary and final for the Department. Appellant alleges at page 2 of his brief:

> [T]he original cancellation of my lease, that caused me a loss of over $75,000, was not a discretionary matter, but a legal question. A review of my cancellation letter (dated 15 July

> 1981) from the Deputy [Assistant Secretary] will clearly show that he stated, "because no colorable legal question has been raised with regards to such action, this decision is based exclusively on discretionary authority and is final for the Department."

[4] As discussed under the "Jurisdiction" section, supra, the characterization of a decision as discretionary is a legal conclusion based on legal analysis and is reviewable by the Board. In most cases, the cancellation of a lease, which potentially involves an interpretation of a contract, Federal regulations, and Federal, state, and tribal case and statutory law, will require an interpretation of law. 4/

In appellant's case, the record reveals that the cancellation decision was based on an analysis of appellant's conduct measured against the lease terms and a tribal ordinance. Because this analysis was made in accordance with general legal principles, it involved an interpretation of

4/ The provisions of 25 CFR 2.19(c) have been the source of apparent confusion for some time. See, e.g., Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 90 I.D. 243 (1983); Allen v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982); St. Pierre v. Commissioner of Indian Affairs, 9 IBIA 203, 89 I.D. 132 (1982), disapproved in part, Burnette v. Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 464, 89 I.D. 609 (1982); Hamlin, supra. It seems possible that because the decision to issue a lease is often a discretionary act, some BIA employees may have assumed that the subsequent administration of the lease is also discretionary. This is an erroneous assumption, for once a lease has been issued, the lessee acquires legal rights under the lease agreement and Departmental regulations. In administering the lease, the interpretation of the agreement, of regulations governing leasing activity, and of applicable statutes and tribal law, involves legal analysis. Section 2.19(c)(2) makes such legal determinations reviewable by the Board to insure the correct application of law in individual cases. Thus, the characterization of a lease cancellation as discretionary is always suspect. The refusal to issue a lease, however, is more likely than not properly characterized as discretionary. An erroneous BIA decision based upon an assumption that contractual rights under leases of Indian trust lands exist only at the discretion of Departmental officials would certainly be found to be arbitrary and capricious if it came under judicial review.

law, and the characterization of the determination as discretionary was therefore incorrect.

Appellant now argues that he did not appeal the decision because it was improperly characterized as final for the Department. Under appropriate circumstances, the Board might be receptive to such an argument. 5/ Here, however, appellant admits committing the zoning and subleasing violations and timber trespass that were the basis for the cancellation of his leases. Had the Board reviewed the matter, it would have been required to affirm the decision based on appellant's admissions. Therefore, although BIA did improperly characterize the 1981 decision as discretionary and final for the Department, that mistake constitutes harmless error under the circumstances of this case.

Appellant next argues that BIA failed to comport with section 2.19(a) when it did not take action within 30 days after the appeal became ripe for decision:

> [T]he Deputy [Assistant Secretary] acknowledged that I filed the appeal in a timely manner, however, it was 75 days after I filed my appeal before the Deputy responded. (May 6th until 20 July [1981]). Upon receipt of the cancellation, I telephoned * * * officials of the BIA in Washington D.C. * * * I was told that the 30 day time limit had been met since they had "acted" by reading my appeal and talking about it. They told me that my case would not be referred to The Board. Since I am one to believe that federal officials do not lie and since I am not an attorney I thought that they had indeed acted in a timely manner. Today, I know that this is not the case and that The Board seems to have automatic jurisdiction in the matter of the cancellation of my lease. During the process of filing an appeal of May 6th 1981, I

5/ Although it is difficult to prove estoppel against the Government, the remedy is available if the elements are met. See Native Americans for Community Action v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 214, 219 (1983).

> mailed a copy of my appeal to The Board, and I have documentation that The Board received this copy on May 12. I assumed that The Board would have automatic authority if the Deputy [Assistant Secretary] did not act within 30 days. Thus I request The Board to order making a preliminary determination of the cancellation of my lease by the Deputy [Assistant Secretary] in a letter dated July 15, 1981.

[5] Contrary to the position reportedly taken by BIA, "action," as referred to in section 2.19(b), contemplates that within 30 days after an appeal becomes ripe for decision, the Deputy Assistant Secretary will either issue a written decision on the appeal or else refer the appeal to the Board for decision. If neither of these actions is taken within 30 days, the Board has the right to review the appeal and to render a decision in the matter. See Rose v. Anadarko Area Director, 12 IBIA 130 (1984).

[6] Appellant is thus correct that the Board acquires jurisdiction under section 2.19 immediately after the expiration of the 30-day time period. However, the fact that the Board then has jurisdiction to hear the appeal does not mean that the appeal automatically comes to the Board without further action. In Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 146, 153 (1983), the Board discussed the status of an appeal after expiration of the 30-day time period in declining to hold that a decision issued by the Deputy Assistant Secretary after that time was void:

> Under 25 CFR 2.11(a) a notice of appeal filed with the [Deputy Assistant Secretary] must also be served on the Board. Service on the Board of subsequent documents is not required. Therefore, the Board does not have independent knowledge that the 30-day limitation established in section 2.19 has expired. When an appellant informs the Board of the expiration of this period through the filing either of a notice of appeal giving evidence of the expiration or of a motion for the Board to assume

> jurisdiction over the appeal, the Board will act to ensure that the time limitation is properly observed by docketing the case and requesting transmittal of the administrative record from the office of the Deputy Assistant Secretary.

In the absence of a proper decision or referral by BIA, it is incumbent upon an appellant to provide the Board with information alleging and invoking its jurisdiction. As discussed in Urban Indian Council, a separate notice of appeal or motion to assume jurisdiction filed with the Board is sufficient to accomplish that purpose.

Appellant argues that the Board should have assumed jurisdiction over his appeal on its own motion because, following the requirements of 25 CFR 2.11(a), he filed a copy of his appeal to the Deputy Assistant Secretary with the Board. This argument was anticipated in Urban Indian Council. The fact that an appeal has been filed with the Deputy Assistant Secretary means only that the matter might later come before the Board. The Board declines to exercise its jurisdiction without knowledge that the 30-day period has expired and that the appellant does not wish to wait for a decision from BIA. Therefore, filing a copy of an appeal to the Deputy Assistant Secretary with the Board under 25 CFR 2.11(a) is not sufficient in itself to cause the case to be transferred automatically to the Board upon the expiration of the 30-day period established in 25 CFR 2.19(a).

Appellant permitted the 30-day time limit for decision by the Deputy Assistant Secretary to expire. Although the Board had jurisdiction at that time, appellant failed to file with the Board a separate notice of appeal, a motion for it to assume jurisdiction, or any other document

alleging Board jurisdiction. Consequently, appellant failed to invoke the Board's jurisdiction.

[7] The Board thus reaches the specific question noted at the beginning of this discussion: whether appellant is entitled to a refund of prepaid rent following cancellation of his leases. The general rule of law is that advance rents paid by a defaulting lessee may be retained by the lessor. See, e.g., Zaconick v. McKee, 310 F.2d 12 (5th Cir. 1962); Sline Properties, Inc. v. Colvin, 190 F.2d 401 (4th Cir. 1951); State Highway Commission v. Demarest, 503 P.2d 682 (Or. 1972); Sinclair v. Burke, 287 P. 686 (Or. 1930). The rule and its underlying rationale are succinctly explained in Annotation, 27 A.L.R.2d 656, 658, 659 (1953):

> It is well settled that where a lease requires payment of rent in advance the lessor may retain the payment, upon default of the lessee * * * constituting a breach of the lease, in the absence of a provision for its refund, because the right and title thereto passed upon the execution of the lease or the payment required, and prevention of its application to the part of the term for which it was paid arose from the lessee's own conduct.
>
> * * * * * *
>
> A provision in a lease for payment in advance of the rent is not a provision merely to secure the lessor for the performance of the undertakings of the lessee expressed in the lease, but simply a provision requiring certain rents to be paid in advance, and a payment made in accordance therewith may be retained by the lessor where, pursuant to the terms of the lease, he terminates it for the default of the lessee * * * even in the absence of an agreement to that effect. [Citations and footnotes omitted.]

This rule has been adopted by the courts of the State of Washington where the land at issue is located. See Lundsten v. Largent, 298 P.2d 488, 491 (Wash. 1956), and cases cited therein. In the absence of superseding Federal law, the Board normally follows the law of the state in which real property is

located in resolving disputes relating to that land. See Walch Logging Co., v. Portland Assistant Area Director, 11 IBIA 85, 98 n.8, 90 I.D. 88, 95 n.8 (1983); Estate of Richard Doyle Two Bulls, 11 IBIA 77 (1983).

The July 15, 1981, decision of the Deputy Assistant Secretary canceling appellant's leases, which was not appealed, found appellant to be a defaulting lessee. Appellant therefore comes within the rule denying recovery of advance rents by a defaulting lessee. Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 22, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) denying appellant's request for a refund of prepaid rent is affirmed.

//original signed
Jerry Muskrat
Administrative Judge

We concur:

//original signed
Franklin D. Arness
Administrative Judge

//original signed
Bernard V. Parrette
Chief Administrative Judge